No. 2591.

In The United States Circuit Court of Appeals for the Ninth Circuit.

SMITH-POWERS LOGGING COMPANY, a Corporation, and C. A. SMITH LUMBER & MANUFACTURING COMPANY, a Corporation, *Appellants*,

vs.

E. W. BERNITT and VICTOR WITTICK, *Appellees.*

Appeal from the District Court of the United States, for the District of Oregon.

SUPPLEMENTAL ANSWER BRIEF OF APPELLEES.

W. U. DOUGLAS, Marshfield, Oregon.
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Appellants' Reply Brief is largely devoted to criticisms of appellees' brief, and it may perhaps

appear to be merited. The record, however, shows that appellants made no service of their opening brief until the 27th day of September and the trial of the suit was set for the 8th of October, 1915, thereby in effect allowing appellees but seven days within which to prepare, print, serve and file their answer brief, and this too in a case where the printed abstract alone includes at least 500 pages. Counsel for appellees therefore feel no disgrace in confessing to any imperfections that may exist.

The appellants' counsel laboriously but unsuccessfully argue that appellees have abandoned their original claims in this suit and have now switched to something else. Whether the original agreement is to be designated a partnership or tenancy in common, or what not, the question is, does the evidence and law support the decree? Even though there may be some uncertainty as to the classification of the contract, we find a long line of Oregon decisions cited on page 42 of appellees opening brief, supporting the rule that whether the relation of partners or co-owner exist, the rights of the parties are the same, and though the relations of the parties may be improperly characterized, an accountfng will be proper if they sustain such relation to each other as that equity may assume jurisdistion.

Appellants also indulge in considerable criticism of appellees' statement of the facts set forth in their brief at pages 7 to 9, all apparently because it did not conclude with, possibly, these or similar words: "By reason of which they and their prede-

cessors were to, and did, acquire an undivided one-half interest in the booms and the right, franchise or easement to raft and boom logs upon the land." This criticism may be merited so for as the statement, itself, is concerned, but the Court has before it the pleadings, the evidence and the whole case to consider, not merely the statements of counsel. In order to appease counsel we would respectfully ask the Court to consider those words incorporated in the original.

Appellees do not call upon the Court to assume any facts in this case necessary to support the decree of the lower Court. They claim, however, that the evidence as shown by the record does justify the decree.

Appellants' objection at page 11 as to the language employed in appellees' brief at page 20 thereof, seems strained. True, it would be absurd for appellees to attempt to establish their case by reason of the bill of sale referred to, but the language used in that bill of sale (Exhibit 8) is certainly corroborative in that it shows at the time it was made (1884) what the parties Klahn and Bernitt had in their minds with reference to property rights in these booms.

The printed abstract does not show these various bills of sale that were introduced to be acknowledged, the reason for which is not apparent, as an inspection of the exhibits themselves, however, will establish that fact.

Because appellants' brief states appellee Bernitt

did not testify that the original parties had some interest in the booms, does not establish that to be the fact. Bernitt's testimony on pages 138-139 and Wulff's testimony at pages 135 to 138 of the transcript shows conclusively that they did so testify, as well as at other places in the transcript.

Appellants' counsel's simile as to the writer of appellees' brief being like a hen trying to hatch out door knobs is amusing, but to apply it in the manner he evidently intends one must be stimulated by an overheated imagination. The only things entering into this case that could be similarly characterized are the misleading conclusions, theories and statements contained in appellants' brief, made apparently in the hope that he will be able to muddy up the water and thereby cause the eal issues and facts to be lost sight of.

Counsel challenges appellees to show where the testimony supports the statement that Dean & Co. was to have one-half interest in the booms and the rafters the other half. Appellees would again refer to the testimony of E. W. Bernitt at pages 138 and 139 of the transcript. He says that Merchant told him Young and Wulff were to take a half interest in the booms and tried to induce the witness and Klahn to go in and take a fourth, and let Wulff and Young have the other fourth. Possibly counsel will still insist that appellees should go further and indicate the words used and pages of transcript to show that Wulff and Young and Klahn and Bernitt did go into the enterprise. If so, attention is called to pages 135, 142, 143, and

155 of the transcript.

Question one, attempted to be set up by appellants in their reply brief is, did appellees sustain their burden of showing the original agreement made the raftsmen joint owners or cotenants with E. B. Dean & Co. in the real property? Other than the right to build, maintain and operate the booms thereon, appellees have claimed no title or interest in the land. The evidence just referred to above clearly establishes the fact that they entered upon the land at the solicitation of E. B. Dean & Co. joined in and contributed to the enterprise of building the booms with the understanding that they were to have an interest in them, and they, the rafters, have continued to operate them from 1881 to 1909, about 28 years.

The answer to their second question is given by the same evidence which settled the first.

In answer to the third question. The statute of frauds does not apply. The contract upon which this suit is based is an executed contract so far as appellees are concerned. There was nothing further for them to do in order to have their interest in these booms. Equity will not allow the statute to be used as a cover for fraud. (Appellees brief pp. 46 to 49)

Answering the fourth question. The facts disclosed by the testimony show the appellees have been in possession of the booms, exercising the very rights they now claim, i. e, that they have had exclusive possession for catching logs and

timber, and making up rafts of logs and exercising the sole right of taking the timbers therefrom to the mills, and maintaining and operating them for not less than twenty-seven years. That Smith did not have the property examined to see if anyone was in possession, and appellees were in actual possession at the time he claims to have purchased, and he continued to allow appellees to operate the booms as formerly for all of that season and also the next without controversy, (Appellees' brief pp. 50 to 60).

As to the fifth question, that of whether the ouster was in 1908 or 1909. It is conceded there is testimony to the effect that the appellant Smith-Powers Logging Company by A. H. Powers told appellees that it refused to recognize their claim some time in the fall of 1908. The old adage "Actions speak louder than words", may not be a quotation from any of the learned text writers, yet it is a common sense term to use in interpreting the acts, doings and sayings of men. This is applicable here because the testimony shows that these appellees did continue in the actual use and occupancy of the booms after such statement by A. H. Powers on behalf of the Smith-Powers Logging Company. They did enter into possession of the booms, catch logs therein, sort logs and raft logs therefrom during the fall and winter of 1908, and also the Spring of 1909, without objection on the part of the Smith-Powers Logging Company or any one else, but with its apparent encouragement, although appellants may have had men there also doing similar work (See reference to pages of trans-

cript given at page 81 appellees' answer brief). But after the work of the season was done and these rafters attempted to collect their portion of earnings, they were not only prevented from obfaining the money which their interest in the booms had earned for catching logs, but also for rafting the logs to the mills, not only logs going to the Smith mills but to the mills of the Simpson Lumber Co. as well. This then is the time when the actual ouster took place. If the appellants, after notifying them that they did not recognize their claims on the booms, had refused to permit the appellees to enter into the possession of the booms and work in and around them the same as formerly it might then be claimed with at least some small degree of probability that the ouster occurred in 1908. To illustrate, if these appellees should bring an action or suit involving the question of ouster, and should rely and base their action upon the statement of the appellants that they did not recognize any claim of appellees in the premises, but the evidence disclosed the fact that appellees continued to enter in and upon the premises at will and operate the same as formerly, certainly no court would sustain them in their contention of ouster if an issue were raised by a denial of it.

Answering question six. This would seem to have been answered at pager 82 to 84 inclusive of appellees' brief, but in further explanation we might add:

It is true appellees are claiming the use of the

booms after it is claimed they were repaired under the requirements of the government and government permits issued. This use, however, continued for about one season; at the end of that time the actual ouster took place in 1909 and the Court has allowed appellants to keep those booms with all the improvements, permits, etc., awarding appellees the paltry sum of $1000.00 in lieu of their interest. Appellants, however, are not satisfied; they desire appellees should pay for half of those improvements too, with a result that they could bring appellees out in debt, thereby not only appropriating appellees' property and rights, but imposing apen alty in addition, for claiming an interest. They apparently want to go into a community and appropriate such property as they desire, and if the owners protest, punish them for protesting and claiming their own. As proof of this, counsel requests the Court to read paragraph XX of appellants' answer at page 61 of the transcript, and consider it in the light of this statement, together with the evidence submitted.

Their position, from any standpoint it can be considered, is unfair and inequitable. The evidence shows the improvements claimed to have been made by appellants were made without the acquiescence or consent of appellees; they were given no voice in the matter, either as to plan, cost, or anything else. It is obvious that at the time appellants began to make said improvement they did so with the purpose of ignoring appellees' interests. In other words, they had their feet in the trough

and proposed to occupy the whole of it and crowd appellees out, with just as much consideration for right and wrong and the interest of others as a hog at feed time.

Appellants have not introduced any evidence from which the Court could say what was necessarily spent by them in the improvements claimed.

But, supposing appellants did repair and enlarge the booms at an approximate expense of $31,450.00 with the acquiescence of appellees, those additional improvements would not in equity belong to appellees until they at least satisfied appellants as to the cost of their half, nor would the fact that appellants had made them entitle them to ignore appellees' interest, so that at the time the actual ouster took place the question to be settled would be, *what was appellees' interest worth?* If they owned a half interest in the improvements or were liable for a half of their cost, the value would be a half of the $31,450.00 added to half of the value of the old boom, to-wit, $1000.00 as set by the Court. But if they had not paid for them and were not liable for them the value would be a half of the figure they were worth without those improvements. Accordingly then, if the Court should have found that the booms were worth $33,450.00 with the improvements added, and that appellees should pay for half of the improvements or give appellants credit therefore, this $15,725.00 deducted from the half of $33,450.00, to-wit, $16,725,00, would leave the $1000.00, which is exactly the result of this decree.

This, however, is not satisfactory because appellants want not only to appropriate appellees' interest and all the improvements, but to compel appellees to pay for half of the improvements too. In other words, having spent $31,450.00 on the improvements which they keep and claim as their own, and the Court having awarded appellees judgment of $1000.00 for their half interest, they contend in theory the Court should go farther and also award appellants a judgment of $15,725.00 against appellees, thereby leaving them $14,725.00 in debt to appellants. For what? Because they dare raise their voice in protest against the taking of their property. This may seem like equity to some people with predatory instincts, but it will hardly pass in a Court of Justice.

It is somewhat refreshing to find that appellants concede, at page 21, the rule cited by appellees, that a tenant in common cannot enforce contribution if he asserts ownership of the entire title.

The text writer therein, Cyc, pages 53 to 60, is setting forth the rule as to contribution between tenants in common. He lays down the positive rule that a tenant claiming the entire title, cannot enforce contribution against his co-tenants. Appellants seek, however, to modify this by quoting another rule stated in the following language:

> "Conversely, if he is called upon for an accounting of the rents and profits, he is to be allowed for advances properly made, etc".

Conversely of what? By reading the preceding part of the sentence to which the above belongs, we

find the writer stating the rule that

> "Where a tenant in common claims contribution from his co-tenants for improvements made by him, he must share with them the rents and profits received by him, and conversely, etc".

Is not such an attempt puerile?

Appellants by their plea assume the defense that appellees have and had no interest in the property and claim they ousted them from possession in 1908. The Court finds the ouster took place in 1909 and awards them a portion of the earnings of the booms between those two dates. Appellants still denying title in appellees say, well we have spent a lot of money on the booms, and they must pay for half of the improvements. Under their theory, we have no interest, they keep the booms, yet we must pay for fixing them anyhow. Such a contention is ridiculous, and if successfully maintained in any degree would be worse than affording a common sneak thief protection in the enjoyment of his stolen plunder. It, in effect, imposes a punishment on appellees for attempting to regain what has been taken.

Appellants claim that this case is based on questions of fact, not of law, and then proceed to misstate the facts. Upon pages 19 and 20 of the reply brief they dwell emphatically and insistently upon what they claim to be a fact, that is that C. H. Merehant as receiver sold the entire property of E. B. Dean & Company, including the booms, to the Dean Lumber Company. Appellants have an

ulterior motive undoubtedly in making this claim. They wish to overcome the testimony of the appellees to the effect that they had possession of the boom properties at the time it is admitted that C. H. Merchant was receiver for E. B. Dean & Company. The question, however, of how the Dean Lumber Company acquired its title to this property is not in evidence. In the appellants' first brief we find a statement which was overlooked by appellees' counsel at the time of preparing their first answer brief. There at page 51 is contained the statement that Dean Lumber Company took title in the receivership proceedings from C. H. Merchant as receiver of E. B. Dean & Company about March 1903. The statement is that the witness C. F. Dillman so testified. That is unqualifiedly untrue, and an attorney as familiar with the chain of title to this property as the appellants' attorney is, cannot state such as a fact without presumably knowingly misstating it. A perusal of Mr. Dillman's testimony as set forth in the transcript on pages 464 to 467 will not disclose anything of that kind, neither will his testimony on file in this case. While it is not within the province of the attorneys for appellees to incorporate their testimony into this brief, they wish to insistently urge that such a statement does not appear in the record, and if it did appear, is untrue. Dillman testified that Merchant told him he had possession of that property as receiver. Dillman was appellants, witness and apparently a very much interested party. But the fact is that all the other testimony in the case of both sides show that these rafters and their

predecessors, at all times had actual possession of the booms. They operated them to the exclusion of all other persons, and the Dean interest never at any time sought to take actual possession and operate them. Under those circumstances, if C. H. Merchant as receiver had any possession, it was constructive, through and by reason of the actual possession of his co-tenants, these appellees.

Appellants' objection that appellees are unable to take a stand as to whether a partnership continued to exist on down through the many years which they had possession of the booms or not is unimportant. The Appellees have plead the facts in this case, and the testimony shows the facts. Those facts, in the opinion of appellees' counsel, support the theory of a partnership in the beginning, but whether the partnership continued one year or down to the time of the alleged ouster, or whether or not a partnership existed originally is not material. The material point is that the predecessors of the appellants induced these appellees and their predecessors to enter upon lands belonging to them and contribute and join with them in the construction of log booms upon the premises, with the understanding they were to have an interest in them.

Appellants also make the positive statement that Dean Lumber Company expressly refused to recognize the rights of ownership claimed by the raftsmen. That is also a misstatement of fact as there is absolutely no such testimony. Dean Lumber Co. never at any time gave out any such in-

formation to these appellees, and the most thorough search of the abstract and testimony will not disclose any such evidence.

Throughout their brief appellants continue to restate as a fact that C. H. Merchant as receiver, sold the property to Dean Lumber Company, and upon that false statement proceed to base many phases of their argument. It is true that subsequent to the purchase of the Dean & Co. property by Dean Lumber Company, appellees knew of it. But there is no evidence showing that appellees ever knew that the transfer covered their interest in the boom, nor that Dean Lumber Company claimed it did, nor were they even disturbed in their possession or management of it in the slightest. The evidence shows conculsively that they continued in their possession, operation and management of the booms the same as formerly. Then why should they question any transaction that may have taken place between the heirs of the members of the firm of E. B. Dean & Co. or even C. H. Merchant as receiver, and Dean Lumber Co. Under what rule of law then could appellees have been held to a ratification of a sale of their interest to Dean Lumber Co? Certainly there is none, except possibly the rule of might, so insistently sought by appellants to be applied in this case, and by corporations of like character in dealing with small private interests.

Appellants claim the booms had seen their day, and were getting in a worse state of repair each year. Even though this was true, does it justify

appellants in their attempt to unlawfully appropriate appellees' interest in them? It may be that the booms were getting older, but the testimony shows they were at all times kept in a sufficient state of repair to handle the business, down to the time appellants sought to increase their capacity. There is no testimony showing any material loss of logs and timber out of those booms until Smith-Powers Logging Co. began to tinker with them.

As to whether Mr. Ingram or other parties testified to his or their being in possessson for Smith-Powers Logging Co. during the winter of 1908-1909, does not establish that to be a fact. Appellees saw men there at times, and at other times no one would be there but themselves and their crews. (Trans. pp. 447 and 448).

In conclusion, there is one important point which the Court took cognizance of. That is while appellants have conceded that they knew of appellees' claims to the booms in 1907 still Mr. Powers testified that he told appellees to go ahead and handle the booms for the season in the fall and winter of 1907 and Spring of 1908 as formerly. Whether Mr. Powers made such a statement to them is not material. If he did it certainly shows an acquiescence and acknowledgement of appellees' claims. It may be that if now permitted the witness would, in explanation, testify that he told them that before he knew of their claims, but the fact remains that the pleadings admit knowledge of the appellees' claims in October 1907. Paragraph XI

of Answer (pages 55 and 56 of Transcript,) and the testimony of the witnesses Mereen, Oren, Powers and Bernitt establish it to be a fact. Yet, regardless of such knowledge, appellants permitted appellees to continue in the possession, control and operation of the booms the same as formerly without interference until the end of the 1907-1908 rafting season in the spring or summer of 1908, and even permitted them to take possession of the booms and catch logs, make up rafts therein and raft logs therefrom down to the end of the following rafting season, the spring of, or beginning of summer of 1909.

Counsel becomes quite mellow and considerate in conclusion. He is willing to give appellees the benefit of the doubt and say the rafters did not intend to become grafters, but that they sincerely believe from their association with the old booms for so many years that they surely must have some kind of property rights in them. This is so conciliatory and generous that possibly if appellees were not compelled by the necessities of a strenuous existence to exercise their natural instincts of self-preservation, they might, in order not to be outdone in politeness and liberality, say: Take these booms, the result of twenty-eight years of our work and effort. Yes, take all our property, but don't say so unkind a thing about us.

In glancing over appellees' statement of the case as contained in their first brief, counsel finds that on page 3 it is stated that E. B. Dean & Company was to and did pay 25 cents per thousand feet board

measure, for saw logs and 1-8th of a cent per lineal foot for piles for its own timber caught and handled through the booms. The "1-8th" of a cent there referred to is an error. The Complaint alleges it to be 1-4th of a cent (Par. XIV, p. 8 Trans.,) and the Answer (Par. V, p. 51 Trans.) admits it. The testimony at page 149 of the transcript also shows that the price was 1-4th of a cent, and appellees would respectfully ask the Court to consider the original brief amended in that respect.

Counsel for appellees are still of the opinion that the lower Court's decree should be sustained.

Respectfully submitted,

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